JAN 20 1983
ALEXANDER L. STEVAS
CLERK

No. 82-839

In the Supreme Court of the United States

OCTOBER TERM, 1982

AMERICANA HEALTHCARE CORPORATION, ET AL., PETITIONERS

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES

TURTLE CREEK CONVALESCENT CENTERS, INC., PETITIONER

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES

CARE INNS, INC., PETITIONER

v.

ROBERT F. SMITH, ET AL.

CARE INNS, INC., PETITIONER

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES

LAURA HATHAWAY, d/b/a R.N. NURSING HOME, PETITIONER

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

ANTHONY J. STEINMEYER
ELOLE E. DAVIES
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that the district courts lacked subject matter jurisdiction of each of these consolidated cases involving participation by health care providers in the Medicare and Medicaid programs.

TABLE OF CONTENTS

	Page
Opinions below	2
Jurisdiction	2
Statement	2
Argument	11
Conclusion	23

TABLE OF AUTHORITIES

Cases:

Association of American Medical Colleges v. *Califano*, 569 F.2d 101	11
Califano v. *Yamasaki*, 442 U.S. 682	18
Case v. *Weinberger*, 523 F.2d 602	20
Caton Ridge Nursing Home, Inc. v. *Califano*, 596 F.2d 608	20
Cervoni v. *Secretary of Health, Education and Welfare*, 581 F.2d 1010	11
Ellis v. *Blum*, 643 F.2d 68	18
Geriatrics, Inc. v. *Harris*, 640 F.2d 262, cert. denied, 454 U.S. 832	11, 20
Green v. *Cashman*, 605 F.2d 945	20
Harris v. *McRae*, 448 U.S. 297	3
Lovallo v. *Froehlke*, 468 F.2d 340, cert. denied, 411 U.S. 918	11
Mathews v. *Eldridge*, 424 U.S. 319	3, 8, 9, 11, 14, 19, 21
Northlake Community Hospital v. *United States*, 654 F.2d 1234	9, 19, 21
O'Bannon v. *Town Court Nursing Center*, 447 U.S. 773	20
Town Court Nursing Center, Inc. v. *Beal*, 586 F.2d 266	20, 21, 22
United Mine Workers v. *Gibbs*, 383 U.S. 715	10, 22
United States v. *Pritchett*, 470 F.2d 455	17
Weinberger v. *Salfi*, 422 U.S. 749	9, 11, 22
Youngberg v. *Romeo*, No. 80-1429 (June 18, 1982)	19

Statutes and regulations: Page

Omnibus Reconciliation Act of 1980 Pub. L. No. 96-499, 94 Stat. 2599 *et seq.*:
Section 916, 94 Stat. 2623 13
Section 916(a), 94 Stat. 2623 ..... 10, 12
Social Security Act, 42 U.S.C. (& Supp. IV) 301 *et seq.*:
Title II, 42 U.S.C. (& Supp. IV) 401 *et seq.*:
42 U.S.C. (Supp. IV) 405(b) 3
42 U.S.C. (Supp. IV) 405(g) 3, 8, 9, 10, 14, 15, 19, 22
42 U.S.C. 405(h) 9, 18, 21, 22
Title XVIII, 42 U.S.C. (& Supp. IV) 1395c *et seq.* 2
42 U.S.C. (& Supp. IV) 1395x 4
42 U.S.C. 1395x(j)(9) 16
42 U.S.C. (& Supp. IV) 1395aa 3, 16
42 U.S.C. (Supp. IV) 1395aa(a) 16
42 U.S.C. (& Supp. IV) 1395cc 3, 14
42 U.S.C. (Supp. IV) 1395cc(b)(2) 13, 14, 15
42 U.S.C. (Supp. IV) 1395cc(b)(2)(A).. 3, 14
42 U.S.C. (Supp. IV) 1395cc(b)(2)(B).. 14
42 U.S.C. (Supp. IV) 1395cc(f) 10, 12, 13, 15, 16, 17, 18
42 U.S.C. (Supp. IV) 1395cc(f)(1)(A).. 12, 13, 15
42 U.S.C. (Supp. IV) 1395cc(f)(1)(B).. 12, 13
42 U.S.C. (Supp. IV) 1395cc(f)(2) ..13, 15, 16, 17
42 U.S.C. 1395ff(c) 3, 6, 13-14, 15, 19
Title XIX, 42 U.S.C. (& Supp. IV) 1396 *et seq.* 3
42 U.S.C. 1396 4
42 U.S.C. (& Supp. IV) 1396a 4
42 U.S.C. 1396a(a)(28) 4
42 U.S.C. 1396a(b) 4
42 U.S.C. (& Supp. IV) 1396b(a) 4
42 U.S.C. 1396d(a)(15) 4
42 U.S.C. (Supp. IV) 1396i(a)(1) 4

Statutes and regulations—Continued — Page

28 U.S.C. 1331 ..... 8, 21, 22
28 U.S.C. 1361 ..... 8, 10, 11
42 C.F.R. Part 405:
Subpart K (Section 405.1011 *et seq.*) 3, 16
Section 405.1120(a) 16
Sections 405.1501-405.1518 6
Section 405.1502 6
Sections 405.1510-405.1560 6
Section 405.1561 6
Section 405.1567 6
Subpart S (Section 405.1901 *et seq.*) 3
Section 405.1902 3
Section 405.1902(b) 16
42 C.F.R. Part 431:
Section 431.153 18
Section 431.153(a) 4
Section 431.153(b) 4
Section 431.153(d) 4
42 C.F.R. 440.20(b) 7
42 C.F.R. Part 442:
Section 442.20(a) 4
Section 442.20(b) 4, 22
Section 442.30 8
Section 442.202 4
Subpart E (Section 442.250 *et seq.*) 4
Subpart F (Section 442.300 *et seq.*) 4
Subpart G (Section 442.400 *et seq.*) 4
42 C.F.R. Part 489:
Section 489.10 3
Section 489.16 3
Section 489.53 3
45 C.F.R. 201.15 8

Miscellaneous:
H.R. Conf. Rep. No. 96-1497, 96th Cong., 2d Sess. (1980) 18
H.R. Rep. No. 96-1167, 96th Cong., 2d Sess. (1980) 16, 17
S. Rep. No. 404 (Pt. I), 89th Cong., 1st Sess. (1965) 14

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-839

AMERICANA HEALTHCARE CORPORATION, ET AL., PETITIONERS

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES

TURTLE CREEK CONVALESCENT CENTERS, INC., PETITIONER

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES

CARE INNS, INC., PETITIONER

v.

ROBERT F. SMITH, ET AL.

CARE INNS, INC., PETITIONER

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES

LAURA HATHAWAY, d/b/a R.N. NURSING HOME,
PETITIONER

v.

RICHARD S. SCHWEIKER, SECRETARY OF
HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-31) is reported at 688 F.2d 1072. The opinions of the district courts (Pet. App. A-32 to A-63) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1982. Petitioners' petition for rehearing was denied on October 8, 1982 (Pet. App. A-64). The petition for a writ of certiorari was filed on November 17, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. Part A of the Medicare program, as set forth in Title XVIII of the Social Security Act, 42 U.S.C. (& Supp. IV) 1395c *et seq.*, provides coverage for hospital, skilled nursing facility, and home health services for aged and disabled individuals. The pro-

gram is federally funded and is administered by the Secretary of Health and Human Services. A nursing home may participate in the Medicare program, and thus be reimbursed for the cost of serving eligible beneficiaries, by entering into a provider agreement with the Secretary after the Secretary certifies that the facility meets the requirements for a skilled nursing facility. 42 U.S.C. (& Supp. IV) 1395cc; 42 C.F.R. Part 405, Subpart S. In order to be certified and to maintain its certification, the nursing home must meet each of several "conditions of participation" relating to the health and safety of its patients. 42 U.S.C. (& Supp. IV) 1395x(j); 42 C.F.R. Part 405, Subpart K and 489.10. The Secretary utilizes the findings of state health agencies based on on-site surveys in determining whether nursing homes satisfy the conditions of participation. 42 U.S.C. (& Supp. IV) 1395aa; 42 C.F.R. 405.1902. If a certified facility no longer meets the conditions of participation, the Secretary may terminate or decline to renew its provider agreement upon reasonable notice to the facility. 42 U.S.C. (Supp. IV) 1395cc(b)(2)(A); 42 C.F.R. 489.16, 489.53. A dissatisfied facility is entitled to the same administrative and judicial review procedures that are provided under 42 U.S.C. (Supp. IV) 405(b) and 405(g) to social security recipients affected by adverse administrative action. 42 U.S.C. 1395ff(c). *See Mathews* v. *Eldridge*, 424 U.S. 319, 327-332 (1976).

The Medicaid program was established in Title XIX of the Social Security Act, 42 U.S.C. (& Supp. IV) 1396 *et seq.*, "for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris* v. *McRae*, 448 U.S. 297, 301 (1980).

This program is administered by the states under Medicaid plans that are consistent with federal statutory and regulatory requirements. 42 U.S.C. (& Supp. IV) 1396, 1396a. Following approval of its plan by the Secretary (42 U.S.C. 1396a(b)), a state is entitled to federal financial assistance for providing medical care to eligible individuals. 42 U.S.C. (& Supp. IV) 1396b(a). A state may enter into a Medicaid provider agreement with a skilled nursing facility that meets federal certification standards. Those standards are identical for both Medicare and Medicaid. 42 U.S.C. 1396a(a)(28); 42 C.F.R. 442.202. A facility is deemed to meet the Medicaid requirements if the Secretary has certified it for participation in the Medicare program. 42 U.S.C. (Supp. IV) 1396i(a)(1); 42 C.F.R. 442.20(a) and (b). If the Secretary terminates or declines to renew a Medicare agreement with a skilled nursing facility participating in both Medicare and Medicaid, the state must terminate or decline to renew that facility's Medicaid agreement. 42 C.F.R. 442.20(b). In such cases, the Medicare review procedures are binding for purposes of the facility's Medicaid participation. 42 C.F.R. 431.153(d). Where the state terminates or refuses to renew the provider agreement of a skilled nursing facility that participates only in Medicaid, the state must provide a hearing either before the effective date of nonrenewal or termination or within 120 days thereafter. 42 C.F.R. 431.153(a) and (b).

Under its Medicaid program, a state may also pay for services provided in intermediate care facilities that are certified by the state as meeting federally specified health and safety standards. 42 U.S.C. 1396d(a)(15); 42 C.F.R. Part 442, Subparts E, F and G. Such services are not covered under the Medicare program. 42 U.S.C. (& Supp. IV) 1395x. An

intermediate care facility whose Medicaid provider agreement has been terminated or non-renewed by a state is entitled to the same state administrative review procedures that are available to Medicaid-only skilled nursing facilities.

2. a. Petitioners Americana Healthcare Corporation, Turtle Creek Convalescent Centers, Inc., and Care Inns, Inc. operate nursing homes that were certified as Medicare and Medicaid skilled nursing facilities. Certification surveys conducted by the Indiana State Board of Health disclosed, however, that the petitioners were not in compliance with numerous federal standards for skilled nursing facilities. Federal officials accordingly notified each petitioner that because it did not meet Medicare conditions of participation its Medicare provider agreement would not be renewed (Pet. App. A-5, A-7 to A-8, A-10, A-12). Each petitioner was furnished with a detailed list of deficiencies supporting such a determination (*ibid.*).[1]

---

[1] Petitioner Americana Healthcare Corporation received a four-page statement that included the following deficiencies: "insufficient nurse staff coverage, rehabilitative nursing care services not performed daily, treatments being performed either without physicians' orders or not according to such orders, lack of a clean interior, ineffective asceptic procedures, and food not stored, prepared or served under sanitary conditions" (Pet. App. A-8 n.8). Petitioner Turtle Creek Convalescent Centers, Inc., was informed that its operations were faulty in the following respects: "nursing services not being provided to patients in need of such services, no active rehabilitation program in feeding, bladder training, ambulation and self-care services, patient records lacked pertinent information regarding patient condition, assessment and treatment, and presence of unsanitary conditions relating to dietetic services" (*id.* at A-10 n.11). Petitioner Care Inns' statement of deficiencies listed, among other items, the following: "instances when proper nursing care was not being provided

Federal officials also concluded that petitioners' deficiencies seriously limited their capability to render adequate care and thus placed their patients' health and safety in immediate jeopardy (*id.* at A-27 n.18). Petitioners were informed of their right to request administrative reconsideration and were given an opportunity to submit additional evidence within 60 days of the initial determinations (*id.* at A-5, A-8, A-10, A-12).[2]

Petitioners each requested reconsideration, contending that their facilities were then in compliance with all Medicare requirements (Pet. App. A-5, A-8, A-10, A-13). Pursuant to these requests, the Indiana State Board of Health resurveyed the facilities prior to the effective dates of nonrenewal (*id.* at A-6, A-8, A-10, A-13). These resurveys each demonstrated continu-

---

to patients in need of such care, treatment and medication being administered contrary to physicians' orders, supervision of nursing services inadequate, failure to notify physician in case of patient with recent leg amputation having pain, presence of unsanitary conditions relating to dietetic services, required medications frequently unavailable, and no written procedures for preventing spread of infection from linens and dressings" (*id.* at A-12 n.12).

[2] The decision that a provider agreement will not be renewed upon its expiration is an "initial determination" (42 C.F.R. 405.1502) from which a certified facility is entitled to take an administrative appeal. 42 C.F.R. 405.1501-405.1518. If the initial nonrenewal decision is upheld on reconsideration, the facility may obtain a hearing before an administrative law judge. See 42 C.F.R. 405.1510-405.1560. The decision of the administrative law judge may in turn be reviewed by the Appeals Council, 42 C.F.R. 405.1561, the last step in the administrative review process. The decision of the Appeals Council represents the "final decision" of the Secretary subject to judicial review. 42 U.S.C. 1395ff(c); 42 C.F.R. 405.1567.

ing noncompliance with the Medicare conditions of participation (*ibid.*).[3]

Following the results of the resurveys, and rather than continuing administrative review of their claims, petitioners filed separate actions in the United States District Court for the Southern District of Indiana. Each suit was filed before the nonrenewal date of the Medicare provider agreement involved, and sought to enjoin the Secretary from terminating the agreement prior to holding an evidentiary hearing on whether the plaintiff facility was in compliance with applicable federal requirements (Pet. App. A-7, A-9, A-11, A-13). Petitioners also sought to enjoin the mandatory nonrenewal of their Medicaid agreements based on the Medicare nonrenewals (*ibid.*). 42 C.F.R. 440.20(b). Following separate bench trials, the district court granted a preliminary injunction in the case of petitioner Americana Healthcare Corporation (Pet. App. A-32 to A-34) and permanent injunctions in the cases of petitioners Turtle Creek Convalescent Centers, Inc. (*id.* at A-35 to A-43) and Care Inns, Inc. (*id.* at A-44 to A-56), and in each case ordered continuation of the Medicare and Medicaid provider agreements pending the requested hearings.

b. Petitioner Laura Hathaway, d/b/a R.N. Nursing Home, operates an intermediate care facility that was certified under the Indiana Medicaid program. A certification survey conducted by the Indiana State Board of Health in November 1979 disclosed numer-

---

[3] Contrary to petitioners' repeated assertions (Pet. 7, 21-22), petitioner Care Inns, Inc. was not found to be in compliance with Medicare conditions of participation on resurvey. Rather, the "resurvey demonstrated that in several respects the facility continued to fail to provide the proper and required nursing care to its patients" (Pet. App. A-13).

ous violations of federal standards for Medicaid intermediate care facilities, and the Indiana Department of Public Welfare subsequently notified the facility that it was to be decertified as a Medicaid intermediate care facility (Pet. App. A-14). The facility requested an evidentiary hearing prior to any decertification action. This hearing, however, was continued by agreement of the parties pending a separate state licensure proceeding (*ibid.*). The Secretary was not a party to either the licensure or Medicaid decertification proceedings. Although a state hearing examiner recommended issuance of a license (*ibid.*), the state continued to seek Medicaid decertification (*id.* at A-31 n.19). Federal officials notified the state that federal financial assistance for payments to the facility would be deferred on the basis of the state's determination that the facility did not meet federal standards (*id.* at A-14 to A-17). See 42 C.F.R. 442.30 and 45 C.F.R. 201.15.

Petitioner subsequently filed an action in the United States District Court for the Southern District of Indiana seeking to enjoin the state from discontinuing payments to the facility and the Secretary from deferring federal assistance prior to an evidentiary hearing on the state's decertification decision (Pet. App. A-17). The district court granted a temporary restraining order that was subsequently extended by agreement of the parties and thereafter by court order (*id.* at A-57 to A-63).

3. The court of appeals consolidated the cases below and, in a single opinion (Pet. App. A-1 to A-31), reversed the district court orders. The court of appeals held that the district court lacked jurisdiction under 28 U.S.C. 1331, 42 U.S.C. (Supp. IV) 405(g) or 28 U.S.C. 1361 to grant the relief sought by peti-

tioners, relying upon this Court's decisions in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), and *Mathews* v. *Eldridge*, *supra*, and its own decision in *Northlake Community Hospital* v. *United States*, 654 F.2d 1234 (7th Cir. 1981) (Pet. App. A-18 to A-23).

Jurisdiction under 28 U.S.C. 1331 was found to be precluded by 42 U.S.C. 405(h) (Pet. App. A-18 to A-19). *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 756-762. The court of appeals similarly rejected the claim that 42 U.S.C. (Supp. IV) 405(g) provided jurisdiction in this case. Section 405(g) requires exhaustion of administrative remedies prior to judicial review, and the court concluded that the exhaustion requirement was not satisfied by petitioners' contention that they had raised "a colorable constitutional challenge which is collateral to [their] claim of entitlement and [their] interest in having this issue resolved is so great as to make deference to the agency's judgment inappropriate" (Pet. App. A-21, citing *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 331-332). The court noted that each petitioner "was afforded advance notice of the decision to decertify their respective facility," each was "informed of the deficiencies upon which the decision to decertify the facility was based," and each was "afforded an opportunity for a resurvey to demonstrate any corrections made in the listed deficiencies" and was "permitted to submit documentation explaining or refuting the existence of the deficiencies" (Pet. App. A-22). After listing these procedural protections, the court weighed "the interest in efficient and not unduly expensive administrative procedures as well as the strong government interest in the protection of Medicare and Medicaid recipients" against the "risk that a facility will be erroneously

terminated as a Medicare or Medicaid provider," and concluded that petitioners "have failed to establish a colorable claim of constitutional entitlement to a pre-termination hearing" (*ibid.*). In these circumstances, the court of appeals determined that the exhaustion requirement of Section 405(g) was not waived and that the district courts lacked jurisdiction under that section.

The court of appeals also rejected petitioners' assertion that the district courts had mandamus jurisdiction pursuant to 28 U.S.C. 1361 and Section 916(a) of the Omnibus Reconcilation Act of 1980, Pub. L. No. 96-499, 94 Stat. 2623, 42 U.S.C. (Supp. IV) 1395cc(f) (Pet. App. A-65 to A-66), which amended the Social Security Act to provide certain alternative procedures to the decertification of skilled nursing care facilities found to be in noncompliance with standards for Medicare participation (Pet. App. A-23 to A-31). After a careful analysis of 42 U.S.C. (Supp. IV) 1395cc(f) and its legislative history, the court concluded that it afforded no "clear right to a pre-termination hearing" and that mandamus jurisdiction was therefore inappropriate (Pet. App. A-30 to A-31). Finally, the court rejected Care Inns' contention that the district court had properly exercised pendent jurisdiction over its claim of entitlement to a pre-termination hearing under Indiana law, since there did not then exist a federal claim of " 'substance sufficient to confer subject matter jurisdiction on the court' " (*id.* at A-31, quoting *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966)).

ARGUMENT

The decision of the court of appeals is consistent with this Court's opinions in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), and *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). It is also in accord with the unanimous conclusion of the federal courts of appeals that Medicare providers have no due process right to a pre-termination hearing.[4] Accordingly, further review by this Court is unwarranted.

1. Petitioners initially contend (Pet. 11-17) that the district court has mandamus jurisdiction pursuant to 28 U.S.C. 1361 to compel the Secretary to grant pre-termination hearings. The court of appeals correctly rejected this assertion.

As noted by the court of appeals (Pet. App. A-25), mandamus may properly issue only when three elements are present: (1) the plaintiff possesses a clear right to the relief sought, (2) there is a plainly defined and peremptory duty on the part of the defendant, and (3) no other adequate remedy is available. *Lovallo* v. *Froehlke*, 468 F.2d 340, 343 (2d Cir. 1972), cert. denied, 411 U.S. 918 (1973); *Cervoni* v. *Secretary of Health, Education and Welfare*, 581 F.2d 1010, 1019 (1st Cir. 1978). Furthermore, "[w]hen the performance of official duty calls for a construction of governing law, the [federal] officer's interpretation will not be disturbed by a writ of mandamus unless it is clearly wrong and his official action is arbitrary and capricious." *Association of American Medical Colleges* v. *Califano*, 569 F.2d 101, 110 n.80 (D.C. Cir. 1977). Petitioners do not have a "clear

---

[4] The Court declined to review claims identical to those raised by petitioners in *Geriatrics, Inc.* v. *Harris*, 640 F.2d 262 (10th Cir.), cert. denied, 454 U.S. 832 (1981).

right" to a pre-termination hearing, nor does the Secretary have a plainly defined and peremptory duty to accord them such a hearing. Petitioners, furthermore, have access to fully adequate post-termination administrative and judicial hearings. Accordingly, petitioners have no basis upon which to predicate their claim to mandamus jurisdiction in this case.

Petitioners' mandamus arguments rest squarely upon what they assert is the clear command of Section 916(a) of the Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, 94 Stat. 2623, 42 U.S.C. (Supp. IV) 1395cc(f). Petitioners submit that this section requires a pre-termination hearing whenever the Secretary terminates a facility's Medicare certification. The section, however, does not mandate such a result.

42 U.S.C. (Supp. IV) 1395cc(f) provides, in pertinent part:

> (1) Where the Secretary determines that a skilled nursing facility * * * no longer substantially meets the provisions of section 1395x(j) of this title, and further determines that the facility's deficiencies—
>
> > (A) immediately jeopardize the health and safety of its patients, the Secretary shall provide for the termination of the agreement or of the certification of the facility and shall provide, or
> >
> > (B) do not immediately jeopardize the health and safety of its patients, the Secretary may, in lieu of terminating the agreement or certification of the facility, provide
>
> that no payment shall be made under this subchapter * * * with respect to any individual admitted to such facility after a date specified by him.

> (2) The Secretary shall not make such a decision with respect to a facility until such facility has had a reasonable opportunity, following the initial determination that it no longer substantially meets the provisions of section 1395x(j) of this title, to correct its deficiencies, and, following this period, has been given reasonable notice and opportunity for a hearing.

When enacted, Section 1395cc(f) was entitled "Alternative to Decertification of Long-Term Care Facilities Out of Compliance with Conditions of Participation * * *" (Section 916, Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, 94 Stat. 2623). The alternative sanction created by the section—denial of payment for patients admitted after a specified date—may be utilized by the Secretary "in lieu of terminating the agreement or certification of the facility" (42 U.S.C. (Supp. IV) 1395cc(f)(1)(B)). Section 1395cc(f), however, clearly does not supplant the existing authority of the Secretary to terminate Medicare certification.[5] Thus, the pre-existing provisions of the Social Security Act, which set forth the grounds and procedures for termination of provider agreements as well as the administrative review of such actions, are unchanged by the 1980 legislation. 42 U.S.C. (Supp. IV) 1395cc(b)(2), 42 U.S.C.

---

[5] The alternative sanction provided by Section 1395cc(f), moreover, may only be applied in circumstances that "do not immediately jeopardize the health and safety" of Medicare patients (42 U.S.C. (Supp. IV) 1395cc(f)(1)(B)). If a facility's noncompliance does immediately jeopardize patients' health or safety, the Secretary is required to terminate the provider agreement (42 U.S.C. (Supp. IV) 1395cc(f)(1)(A).

1395ff(c).[6] And, contrary to petitioners' assertions (Pet. 7, 19), these provisions do not provide for post-termination hearings.[7]

---

[6] 42 U.S.C. (Supp. IV) 1395cc provides in pertinent part:

> (b) An agreement with the Secretary under this section may be terminated * * *
>
> (2) by the Secretary at such time and upon such reasonable notice to the provider of services and the public as may be specified in the regulations, but only after the Secretary has determined (A) that such provider of services is not complying substantially with the provisions of such agreement, or with the provisions of this subchapter and regulations thereunder or (B) that such provider of services no longer substantially meets applicable provisions of section 1395x * * *.

42 U.S.C. 1395ff(c) provides in pertinent part:

> Any institution or agency dissatisfied with any determination by the Secretary that it is not a provider of services * * * shall be entitled to a hearing thereon by the Secretary * * * to the same extent as is provided in section 405(b) of this title, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title.

[7] From the inception of the Medicare program, 42 U.S.C. (Supp. IV) 1395cc(b)(2) has stated that a provider agreement may be terminated "by the Secretary at such time and upon such reasonable notice to the provider of services and the public as may be specified in regulations * * *." The original legislative history states that a hearing is required only before a "final" decision of the Secretary. S. Rep. No. 404 (Pt. I), 89th Cong., 1st Sess. 51 (1965). Moreover, 42 U.S.C. 1395ff(c), as enacted in 1965, accords dissatisfied facilities the same post-termination hearings as are provided under 42 U.S.C. (Supp. IV) 405(g) to social security recipients whose benefits have been terminated. *Mathews* v. *Eldridge*, 424 U.S. 319

Petitioners' claims of entitlement to pre-termination hearings are based solely upon the wording of subsection (2) of Section 1395cc(f). That subsection provides that the Secretary shall not make "such a decision with respect to a facility" until the facility has been given "reasonable notice and opportunity for a hearing" (42 U.S.C. (Supp. IV) 1395cc(f)(2)). Petitioners assert that this hearing requirement applies to the decision to terminate a provider agreement as well as to the decision to apply the alternative sanction created by Section 1395cc(f). The court of appeals properly rejected this argument.

The court of appeals correctly noted that subsection (1)(A) of Section 1395cc(f) "requires the termination sanction in cases where the conditions of 'immediate jeopardy' to health and safety are found to exist" (Pet. App. A-28). The court therefore concluded that to construe subsection (2) of Section 1395cc(f) as applying to the termination decision "leads one to the anomalous situation of permitting a skilled nursing facility to continue treating patients under conditions which the Secretary has concluded place the patients' very health and safety in 'immediate jeopardy' while the facilities are afforded a time consuming pre-termination hearing" (Pet. App. A-27).[8]

(1976) (post-termination hearing under 42 U.S.C. (Supp. IV) 405(g) complies with the requirements of due process). Neither 42 U.S.C. (Supp. IV) 1395cc(b)(2) nor 42 U.S.C. 1395ff(c) has been amended in relevant part since 1965.

[8] Petitioners concede that the court of appeals' holding was designed "to avoid a result wherein the Secretary would be prevented from removing patients from an unsafe environment by providers who would exploit appeal procedures to avoid termination from Medicare or Medicaid and, in so doing, would unnecessarily prolong the presence of patients in

The court of appeals' conclusion that the subsection (2) hearing requirement applies to the decision to utilize the alternative sanction but not the termination sanction is supported by pertinent legislative history. The House Report on the Omnibus Reconciliation Act of 1980 explains that the new legislation provides the Secretary with "an intermediate sanction, short of the more drastic step of program termination" (H.R. Rep. No. 96-1167, 96th Cong., 2d Sess. 56 (1980)). The report states that this intermediate sanction will be applied "only after the Secretary has provided the facility with an opportunity to present its case at an

---

unsafe surroundings" (Pet. 15-16). Without attacking the basic soundness of this reasoning, petitioners merely argue that it "misapprehends the position of the Secretary," who petitioners contend is "merely * * * a fiscal agent," while "[m]onitoring the compliance of facilities with Medicare or Medicaid conditions of participation is the function of state inspectors" (*id.* at 16). Such assertions are unpersuasive and groundless. The fact that Congress chose to utilize the resources of available state licensing agencies to make findings regarding the compliance of facilities with the "conditions of participation" (42 U.S.C. (& Supp. IV) 1395aa) does not derogate from the Secretary's primary responsibility of ensuring compliance with Medicare health and safety requirements. These requirements were developed by the Secretary (42 C.F.R. Part 405, Subpart K) and provide that a state license to operate is only one of many criteria for Medicare certification. 42 U.S.C. 1395x(j)(9); 42 C.F.R. 405.1120(a). The findings of the state agencies represent recommendations to the Secretary and are reviewed by trained federal officials, including federal health care professionals, who make the final determination concerning a facility's eligibility to participate in the Medicare program. 42 U.S.C. (Supp. IV) 1395aa(a), 42 C.F.R. 405.1902(b). Indeed, 42 U.S.C. (Supp. IV) 1395cc (f) itself provides that the *Secretary* shall determine whether a facility satisfies Medicare standards or whether the facility's deficiencies immediately jeopardize patient health and care.

informal hearing consistent with current practices" (*ibid.*). The prompt termination sanction, however, was clearly intended to remain applicable in cases of "immediate jeopardy." "[T]he committee believes that [the Section 1395cc(f)] sanction should not be used as an alternative in situations where a noncomplying facility's deficiencies place the health and safety of its patients in immediate jeopardy; instead, the response for the Secretary in such cases must be to deny all reimbursement of additional patients and to make appropriate arrangements for the orderly, planned transfer of existing patients" (H.R. Rep. No. 96-1167, *supra*, at 57). The House Report's explicit discussion of a pre-sanction hearing when the alternative sanction is imposed, its failure to explicate such a requirement for situations requiring the termination sanction, and its emphasis on prompt effectuation of the termination sanction all support the court of appeals' conclusion that subsection (2) does not apply to the termination sanction.[9] "It is ludi-

[9] Petitioners claim (Pet. 15) that principles of statutory construction require that the phrase "such a decision" in subsection (2) be read as applicable to each of the determinations in Section 1395cc(f), including the initial determination that the facility no longer meets the conditions of participation. But qualifying words, phrases, and clauses often refer to the immediately preceding word, phrase, or clause, and should not be construed as extending beyond their first antecedent unless the context indicates otherwise. *United States* v. *Pritchett*, 470 F.2d 455, 459-461 (D.C. Cir. 1972). Here, the context of Section 1395cc(f), as well as its legislative history, indicates that the provisions of subsection (2) do not apply where the Secretary terminates Medicare certification instead of imposing the alternative sanction.

Petitioners also cite (Pet. 16) a passage from the House Conference Report in which the conferees state that "it is not the intention of this provision to alter access to a full eviden-

crous to believe that the legislature intended to permit the appeal procedures to act as a roadblock to the prompt removal of patients for their own protection and safety from substandard facilities" (Pet. App. A-27).

Because Section 1395cc(f) does not provide for a pre-termination hearing in cases where a health facility's noncompliance with federal standards requires termination of the Medicare or Medicaid providers' agreement, petitioners in this case have no "clear right" to the relief sought.[10] The court of appeals correctly concluded that mandamus jurisdiction was unavailable on the facts of this case.[11]

---

tiary hearing before decertification of a facility occurs, as provided under current law." H.R. Conf. Rep. No. 96-1497, 96th Cong., 2d Sess. 141 (1980). However, since "current law" in 1980 with respect to Medicare and joint Medicare-Medicaid skilled nursing facilities did not (and does not) provide for hearings prior to decertification (see note 7, *supra*), in referring to a full evidentiary pre-termination hearing "as provided under current law," the conferees must have been referring to 42 C.F.R. 431.153, which grants states the *option* to provide pre-termination hearings to Medicaid-only facilities.

[10] Inasmuch as it found that the petitioners had no "clear right" to a pre-termination hearing, the court of appeals found it unnecessary to determine whether mandamus jurisdiction is precluded in any event by 42 U.S.C. 405(h) (Pet. App. A-31). This Court has not directly addressed the issue. *Califano* v. *Yamasaki*, 442 U.S. 682, 698 (1979). However, since the court of appeals did not reach the issue there is no conflict to be resolved between this case and *Ellis* v. *Blum*, 643 F.2d 68, 78 (2d Cir. 1981), on which petitioners rely (Pet. 16-17) in urging that mandamus relief is available to review the Secretary's actions where procedural challenges are involved.

[11] Petitioners contend that "at a minimum" they are entitled to a pre-termination hearing where the health and safety of

2. Petitioners next contend (Pet. 17-22) that subject matter jurisdiction is available under 42 U.S.C. (Supp. IV) 405(g)[12] because they have raised constitutional claims that may be heard prior to full exhaustion of their administrative remedies. However, the court of appeals, relying on this Court's decision in *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 332, and its previous holding in *Northlake Community Hospital* v. *United States*, 654 F.2d 1234 (7th Cir. 1981), properly

---

their patients are not immediately jeopardized (Pet. 13), and they assert that the district courts properly found no immediate threat to the health or safety of their patients (*id.* at 13-16). The notice of deficiency sent to petitioner Care Inns, Inc., however, specifically stated that the facility's shortcomings "immediately jeopardized the health and safety of the patients" (Pet. App. A-12), and the notices sent to Americana Healthcare Corporation and Turtle Creek Convalescent Centers, Inc., stated that the homes' substandard conditions "seriously limit your * * * capability to render adequate care and insure the health and safety of your * * * patients" (*id.* at A-27 n.18). The court of appeals correctly determined that, notwithstanding the apparent conclusions of the district courts, the question of whether a situation of emergency or "immediate jeopardy" exists is "more appropriately deferred to the expertise of the licensing agency and it is not a proper consideration for a court under mandamus jurisdiction where a clear right to a pre-termination hearing is required" (*id.* at A-30). Such deference to the expertise of professionals who are trained and experienced in evaluating compliance with Medicare and Medicaid regulations is clearly justified. "[T]here certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions." *Youngberg* v. *Romeo*, No. 80-1429 (June 18, 1982), slip op. 15.

[12] 42 U.S.C. 1395ff(c) provides that a facility whose agreement is terminated has the right to a hearing and to judicial review of the final decision made after the hearing as provided in 42 U.S.C. (Supp. IV) 405(g).

rejected this argument. The court held (Pet. App. A-22) that petitioners had not presented a "colorable" constitutional claim to a pre-termination judicial hearing in view of the many procedural protections that they had been afforded at the administrative level. These protections included: advance notice of the decision to decertify the facility as a Medicare and/or Medicaid provider and of the deficiencies upon which the decertification was based, an opportunity for a resurvey to demonstrate any corrections made in the listed deficiencies or to refute the existence of the deficiencies, and, in the case of petitioner Care Inns, an opportunity to meet with Department of Health and Human Services personnel to submit evidence of compliance with applicable conditions of participation prior to termination (*ibid.*) In so holding, the court of appeals joined all other courts of appeals that have considered the issue. *Geriatrics, Inc.* v. *Harris*, 640 F.2d 262 (10th Cir.), cert. denied, 454 U.S. 832 (1981); *Green* v. *Cashman*, 605 F.2d 945 (6th Cir. 1979); *Caton Ridge Nursing Home, Inc.* v. *Califano*, 596 F.2d 608 (4th Cir. 1979); *Town Court Nursing Center, Inc.* v. *Beal*, 586 F.2d 266 (3d Cir. 1978); *Case* v. *Weinberger*, 523 F.2d 602 (2d Cir. 1975). Thus, no reason exists for this Court to review the court of appeals' holding here.[13]

---

[13] While this Court has not directly decided whether Medicare providers have a due process right to pre-termination hearings, the Court held in *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773 (1980), that a decertified facility's patients have no right to contest their facility's decertification. The *O'Bannon* Court observed, moreover, that the patients "argue that [their alleged third party beneficiary status] somehow entitles them to more than [the provider] itself is entitled to—namely, a pretermination hearing" (*id.* at 785 n.17). The Seventh Circuit has characterized this

3. Petitioners' last contention is that 42 U.S.C. 405(h) does not bar jurisdiction pursuant to 28 U.S.C. 1331 over their claims against the Indiana Department of Public Welfare (Pet. 22-24). They argue that the court of appeals' decision that the district court did not have pendent jurisdiction over petitioner Care Inns' claim against the Indiana Medicaid authorities conflicts with the Third Circuit's decision in *Town Court Nursing Center, Inc.* v. *Beal, supra*, which found Section 1331 jurisdiction over a nursing home's independent claims against a state defendant.

Petitioners' reliance on *Town Court* is misplaced on several grounds. First, the court of appeals cor-

---

observation as "persuasive, if not dispositive, dicta" that providers are not constitutionally entitled to pre-termination hearings. *Northlake Community Hospital* v. *United States, supra*, 654 F.2d at 1242.

Contrary to petitioners' contentions (Pet. 18-22) there are no factors peculiar to their status as providers of skilled nursing care that would warrant a departure from the teachings of *Eldridge* and the numerous subsequent court of appeals decisions dealing with access to pre-termination hearings. As the Seventh Circuit noted in *Northlake Community Hospital* v. *United States, supra*, 654 F.2d at 1242, a provider's interest in the termination of a Medicare agreement is "less weighty" than the interest of a disability claimant in the termination of his benefits since the provider is not the intended beneficiary of the Medicare program. Moreover, the decision to terminate a provider agreement is an easily documented, sharply focused decision in which issues of credibility and veracity play little role (*ibid.*). Finally, the government has a twofold interest in expeditious provider termination—first, to assure the safety and care of elderly patients, and second, to minimize administrative expenses (*ibid.*). These factors are plainly sufficient to overcome a Medicare provider's interest in a pre-termination hearing.

rectly decided that 42 U.S.C. 405(h) bars federal question jurisdiction over petitioners' claims against both federal and state defendants (Pet. App. A-31). *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 756-762. Since the Secretary's regulations require a state to terminate a skilled nursing facility's Medicaid agreement once the Department of Health and Human Services decides to terminate or not renew its Medicare agreement (42 C.F.R. 442.20(b)), to allow a facility to challenge the state decision under 28 U.S.C. 1331 would circumvent the Social Security Act's scheme of permitting judicial review only under 42 U.S.C. (& Supp. IV) 405(g) and (h) after available administrative remedies have been exhausted. Second, in *Town Court*, the facility alleged that the state defendant had an independent obligation to continue Medicaid funding irrespective of the availability of federal reimbursement. 586 F.2d at 279. In contrast, petitioners here assert no such independent obligation on the part of the Indiana defendants. Indeed, they claim that Indiana law prohibits the payment of state Medicaid funds to reimburse a provider when federal funds are not forthcoming (Pet. 5-6). Finally, in holding that pendent jurisdiction to decide the claim of Care Inns was unavailable (Pet. App. A-31), the court of appeals correctly applied the principle enunciated in *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966), that pendent jurisdiction is a discretionary doctrine that requires a federal claim of "substance sufficient to confer subject matter jurisdiction on the court."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General
J. PAUL MCGRATH
Assistant Attorney General
ANTHONY J. STEINMEYER
ELOISE E. DAVIES
Attorneys

JANUARY 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 [illegible] 1283